

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner, Department of Labor and Industry, State of Minnesota, Complainant, v. Cabinets by Dan, Inc., Respondent.	FINDINGS OF FACT, CONCLUSIONS AND ORDER
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This matter came on for hearing before Administrative Law Judge Richard C. Luis on December 10, 2007, at the Office of Administrative Hearings in St. Paul. The record closed at the conclusion of the hearing on December 10, 2007.

Julie A. Leppink, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry ("Complainant"). Dan Jaskowick, 8440 Eagle Creek Parkway, Savage, MN 55378, appeared on behalf of Cabinets by Dan, Inc. ("Respondent").

STATEMENT OF ISSUE

Whether the Respondent was in violation of OSHA standards at its work site in Savage, Minnesota, on July 13, 2006, and if so, what penalties are appropriate?

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Amy Gallagher is an Industrial Hygienist for the Minnesota Office of Safety and Health (MnOSHA).¹ Ms. Gallagher has two years of work experience with the Agency, after receiving an undergraduate degree in cell biology and a Master's in Environmental Health.²

2. On July 13, 2006, Ms. Gallagher conducted a partial health investigation, pursuant to a formal complaint that had been filed regarding operations at the Respondent's work site. The complaint stemmed from one of the Respondent's operations, which involved the mixing of contact cement. That process utilized a chemical that contains methylene chloride, a carcinogenic substance.

3. On August 10, 2006, Ms. Gallagher issued an Inspection Report, which Report included three separate citations that the Respondent has appealed:

a. A citation and proposed adjusted penalty in the amount of \$525 for violation of 29 CFR 1910.1052(d)(2), which provides that when employees are exposed to methylene chloride, the employer must perform initial exposure monitoring to determine each affected employee's exposure. This citation was issued because employees that made laminate countertops worked with contact cement, which contains methylene chloride, and the Respondent did not conduct initial monitoring to assess possible employee exposure to that substance; and

b. A citation and proposed adjusted penalty in the amount of \$525 for violation of 29 CFR 1910.1052(l)(3)(i), which requires the employer to inform each employee exposed to methylene chloride of the requirements of the regulation and the information available in the appendices to the regulation, as well as how to access or obtain a copy of those documents in the work place. In this instance, the Respondent did not provide information on the methylene chloride standard to employees who worked with contact cement containing that substance; and

c. A citation and proposed adjusted penalty in the amount of \$700 for violation of Minn. R. 5206.0700, subps. 1 & 2, which require an employer to develop and implement a Right-to-Know training program for employees who are exposed routinely to hazardous substances. In this instance, the employees working on the shop floor were exposed to several hazardous substances, in addition to contact cement, including a number of solvents, wood-dust and glues or adhesives. The employer

¹ MnOSHA is a division of the Minnesota Department of Labor and Industry. The acronym is derived from the federal Occupational and Safety Health Act (OSHA).

² Testimony of Amy Gallagher.

had not conducted Right-to-Know training on these hazardous chemicals initially or annually for its employees.³

4. Mr. Jaskowick, who is the President of Cabinets by Dan, Inc., filed an appeal of the citations on behalf of the Respondent, and this hearing process followed. Mr. Jaskowick does not question the rule violations noted above and as cited in Gallagher's Inspection Report. The Respondent's appeal is confined to the cumulative amount of the proposed penalties (\$1,750.00).

5. Regarding Citation 1, Item 1, which is based on violation of 29 CFR 1910.1052(d)(2) summarized above, the Complainant's rationale for the penalty calculation in that instance is derived by a combination of the severity of the violation, the level of employee exposure to the methylene chloride, and the proximity of employees to the hazard. Ms. Gallagher used OSHA's Field Compliance Manual⁴ to determine, based on the factors noted, an unadjusted penalty of \$1,500 for this violation. That amount was reduced by 65% to a proposed adjusted penalty of \$525, based on the size of the Respondent's workforce and its history of no previous violations. A similar rationale was applied in calculating the proposed adjusted penalty of \$525 in Citation 1, Item 2, for violation of 29 CFR 1910.1052(l)(3)(i).⁵

6. With respect to Citation 1, Item 3, citing the Respondent for violation of Minn. R. 5206.0700, subps. 1 and 2, an additional penalty factor was applied, based on "Duration of Hazard" (employees were exposed to the harmful solvents, adhesives and methylene chloride from 51% to 100% of the normal workday). After application of this additional factor, the unadjusted penalty for the violation reached \$2,000, which was also reduced by 65%, resulting in a proposed adjusted penalty of \$700.

7. The employer has taken appropriate abatement action to alleviate the conditions that led to issuance of the citations detailed above not. The Respondent does not contest the Citations issued or the underlying violations at the base of those citations. The Respondent also does not contest the rationale for the penalty calculations regarding any of the violations for which adjusted penalties were proposed. The basis of Mr. Jaskowick's appeal is that payment of the total of the proposed adjusted penalties (\$1,750.00) is too heavy a financial hardship for the Respondent, and such a financial hardship would force it out of business.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

³ Exhibit 1.

⁴ Exhibit 6.

⁵ Exhibit 1, Exhibit 6.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 182.664.

2. The Department gave proper notice of the hearing in this matter and has fulfilled all procedural requirements.

3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. The Complainant has the burden of establishing an OSHA violation by a preponderance of the evidence. In this case, the Complainant has established by a preponderance of the evidence that the Respondent has violated the provisions of 29 CFR 1910.1052 and Minn. R. 5206.0700 detailed in the citations contained in the Inspection Report of Amy Gallagher, filed August 10, 2006. Minn. Stat. § 182.666, subd. 6, authorizes the Commissioner to assess fines, giving due consideration to the size of the employer's business, the gravity of the violation and the history of previous violations.

5. The record supports the Department's penalty calculation regarding the severity and probability of harm of each violation. Adjusting the penalty calculation to the appropriate severity and probability of harm results in penalties of \$525 each for violating 29 CFR §§ 1910.1052(d)(2) and 1910.1052(l)(3)(i) and \$700 for violating Minn. R. 5206.0700, subps. 1 & 2.

Based on the Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED that:

1. Citation 1, Item 1, penalizing the Respondent for violation of 29 CFR 1910.1052(d)(2), and Citation 1, Item 2, penalizing the Respondent \$525 for violation of 29 CFR 1910.1052(l)(3)(i), and Citation 1, Item 3, penalizing the Respondent \$700 for violation of Minn. R. 5206.0700, subps. 1 and 2, are **AFFIRMED**.

2. The Respondent shall forthwith pay to the Commissioner of Labor and Industry the sum of \$1,750.00.

3. If the penalty is not paid within 60 days after the fine becomes a final Order, it must be increased to 125% of the originally-assessed amount. Furthermore, after 60 days, the unpaid fine shall accrue an additional penalty of

10% per month, compounded monthly until the fine is paid in full, as required by Minn. Stat. § 182.666, subd. 7.

Dated: January 7th, 2008.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Digitally recorded. No transcript prepared.

NOTICE

Notice is given that under Minn. Stat. § 182.664, subd. 3, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. R. 5215.5000-5215.5210.

MEMORANDUM

The Respondent argues that imposition of the penalties against it in the total amount ordered, \$1,750.00, will send the business into financial collapse. While Mr. Jaskowick made this allegation orally, he provided no financial statements, tax returns, bank records, or any other financial data to support that claim. In the absence of such evidence, the Administrative Law Judge has no alternative but to uphold the Citations and the resulting, properly-calculated penalty amounts.

R. C. L.